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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 501.

BINKS MANUFACTURING COMPANY,
Petitioner,

vs.

RANSBURG ELECTRO-COATING CORP.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

The "questions for review" stated in the petition are not presented by the Record in this case. Petitioner does not in reality seek review of the decision of law questions, but is dissatisfied with the **facts** as found below and seeks a redetermination of fact issues.

The four abstract questions (Pet., pp. 2-3) could be answered either affirmatively or negatively by this Court and still not be dispositive of any part of the case, because **all of the questions are based upon assumptions of fact either not supported by, or contrary to, the findings of the District Court, concurred in by the Court of Appeals.**[1]

For example the assumption in Questions 1 and 2 that Respondent "requires" its licensees to obtain from it unpatented equipment and services and to take a license under unwanted patents is in direct conflict with Findings 65, 66, 70, and 71 (P. A. 1001-02; 1003-04) that no such requirement has ever been imposed.

Likewise, the assumption in all four questions that Respondent is "dominating an industry" is in direct conflict with Findings 82 and 83 (P. A. 1011) that it does not dominate the industrial painting industry or even the field of electrostatic spray-coating, but that its "dominance" extends only to the limited field of **airless** electrostatic spray-coating systems by virtue of its patents held valid below, the use of which systems accounts for only approximately one per cent of the paint, varnish, and lacquer used industrially in the United States.

Questions not supported factually in the Record are academic. Certiorari is an instrument of the courtroom, not the classroom.

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[1] The Petition makes no showing of error in the findings below, much less the "very obvious and exceptional showing of error" which this Court requires when findings have been concurred in below. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271, 274-5, 93 L. Ed. 672, 676-7, 69 S. Ct. 535.

QUESTIONS PRESENTED FOR REVIEW.

The four "questions" upon which the Petition seeks a writ of certiorari are not "expressed in the terms and circumstances of the case" [Rule 23 (1) (c)] or presented by the Record. Each "question" misstates or disregards relevant and controlling facts, concurrently found by the courts below as follows:

1. Respondent has always been ready and willing to grant licenses under its patents without unpatented equipment or services and has never required or forced anyone to take such equipment or services as a condition to obtaining a license.

2. At no time has Respondent required any licensee or lessee to take a license under any unwanted patent.

3. The only license-back clauses were in contracts made in the early period of marketing Respondent's airless electrostatic coating systems and were eliminated from its contract forms in January, 1955. The granted-back licenses were to involve only developments related to the licensed process and were to be non-exclusive and limited to use of the developments in coating methods and apparatus. Respondent never acquired any patent right pursuant to the clause, and there is no evidence that the clause discouraged research or invention.

4. There is no evidence of fraud or misrepresentation to the Patent Office in the procurement of Respondent's patents.

STATEMENT OF THE CASE.

The "Statement of the Case" in the Petition (pp. 4-10) by no means contains "all that is material to the consideration of the questions presented" by the Petition, as required by Rule 40 (1) (c) of this Court. To the contrary, from a fragmentary recital of out-of-context portions of the Record, the Petition asserts or invites inferences which ignore and are inconsistent with the controlling facts as established by documentary evidence and testimony at the trial, and as found against the Petitioner by the District Court (P. A. 968-983; 998-1013) and concurred in by the Court of Appeals (Pet. App. 2-8).

Development by Respondent of Its Electrostatic Spray-Coating Systems.

In 1937, Harper J. Ransburg, a resident of Indianapolis, Indiana, assisted by his three sons, was engaged in the manufacture and sale of houseware items, such as canister sets, bread boxes, and similar accessories, which were painted by means of conventional compressed-air spray guns, with great loss of paint through "over-spray". The Ransburgs commenced experiments in 1937 which ultimately resulted in the development of their "No. 1

The following references are used in this Brief:

Petition for Writ of Certiorari	"Pet."
Petitioner's Appendix	"Pet. App."
Appendices in Court of Appeals:	
Plaintiff's Appendix	"P. A."
Defendant's Appendix	"D. A."
Findings of Fact	"Find."
Plaintiff's Exhibit	"Px."
Defendant's Exhibit	"Dx."

Process", in which the coating material is sprayed by means of compressed-air spray guns into a high-voltage electrostatic field, which is maintained between wires or electrodes and the conveyorized articles of manufacture, so that the paint particles are electrically charged and urged toward deposition upon the articles by the effect of the field.[2][3] This was the first commercially-used electrostatic spray-painting system and was brought onto the market by the Ransburgs in 1944, after they had formed Respondent's predecessor partnership (Find. 9; P. A. 977-78).

Although the No. 1 Process was a definite improvement over non-electrostatic air-spray coating, some overspray persisted by reason of the air blast, and the Ransburg partnership continued its research and development work, as a result of which it developed its "No. 2 Process", which eliminates the compressed-air spray gun as the atomizing device. In this process, in substance, the electrostatic field is maintained directly between the atomizing device, or head, and the articles to be painted. The coating material is fed at a controlled rate to and distributed along the edge of a stationary or rotating atomizing head, the strength of the field at the edge being such that the field is capable of electrostatically atomizing fine, electrically-charged particles from the liquid, dispersing them in the form of a spray, and depositing them upon the articles. This process virtually eliminates over-spray and

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[2] Finds. 7-9; P. A. 976-78. H. Ransburg, P. A. 409-10; D. A. 164-67. E. Ransburg Depo., Px. KKKK, pp. 3-4; D. A. 146. Miller, D. A. 121. Px. EEEE, P. A. 854.

[3] Contrary to Petitioner's assertion (p. 6), no electrostatic atomization of the liquid occurred in the *use or operation* of this system. The cited Respondent's Admission 65 (P. A. 204) *denied* that electrostatic atomization occurred in the *use* of the system; and admitted only that "*upon shutting off the operation,*" when the flow of compressed-air ceased before the flow of paint ceased, a jet of paint was *momentarily* discharged adjacent the high potential electrodes, with the result that "some atomization" occurred.

paint loss, reduces labor costs, and substantially reduces the manufacturer's investment in spray booths, exhaust systems, and related equipment. Respondent corporation was formed by the Ransburgs in 1948 to market its electrostatic processes and began general marketing of the No. 2 system in 1951.[4, 5]

Respondent's Marketing Program.

After analyzing in its Indianapolis laboratories the finishing problems of a prospective customer, Respondent designs and demonstrates to him a system satisfying his production needs and estimates the paint savings which may be anticipated (Find. 61; P. A. 998-99). Available to the interested prospect are two types of license agreements: (1) Licensing the right to use the process and obligating Respondent to furnish on a lease basis the necessary specialized equipment, to supervise its installation, and to replace defective parts without charge, in consideration of the payment of a fixed initial fee and thereafter monthly fees representing a portion of the savings resulting from the use of the system, computed as a percentage of the cost of the coating material used in the system, subject to a monthly minimum (Find. 62; P. A. 999-1000); or (2) Licensing the use of the process without equipment,

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[4] Finds. 7, 11; P. A. 976-79. Miller, D. A. 78-81, 82-96, 111-13; P. A. 255-56, 264-74. H. Ransburg, D. A. 170-73; P. A. 409, 430-31. Howarth, D. A. 129-30; Px. IIII, pp. 3, 4; D. A. 455-59; Px. UUUU, p. 2; D. A. 389.

[5] Although irrelevant to any question here presented, Petitioner asserts (p. 7) that the No. 2 system uses a centrifugal atomizing head and does "not effect atomization and dispersion of liquid *solely* by the electrostatic field (P. A. 350-357)." Petitioner ignores the bulk of the testimony of Witness Miller, who acknowledged that rotation of the head is necessary "to *effect painting*" with that particular system, but testified clearly that the rotation of the disc is merely an expedient for feeding the liquid appropriately to the edge of the disc and the atomizing zone (P. A. 371, 373; D. A. 118), and that the electrostatic field "has *everything* to do with," and causes, the atomization (D. A. 84-85).

service, or replacement parts, in consideration of appropriately reduced initial and monthly fees which make due and proper allowance for elimination of the equipment and related services (Finds. 63-70; P. A. 1000, 1003-04). All No. 2 system licensees have entered into the first type of agreement, providing for equipment and related services, because they desired above all a satisfactory working system which would perform as demonstrated and behind which Respondent would stand (Finds. 64, 67; P. A. 1000-01, 1002-03).

It has always been the policy of Respondent and its predecessor to make available to anyone who desired it a license to use the process without equipment and related services, and this policy has been repeatedly expressed to Respondent's personnel in written bulletins from 1947 until the filing of the instant action.[6] Although no prospect had ever expressed interest in a non-equipment license, commencing in 1953 Respondent prepared and stocked standard printed contract forms for such licenses, instructed its sales personnel to advise all prospects that they were available, and informed its existing licensees of their availability.[7, 8] Since 1953, Respondent has affirmatively in-

[6] Find. 65; P. A. 1001-02. H. Ransburg, P. A. 463-64; D. A. 178-79, 180-84, 184-85, 185-88. Dxs. 23, 24, 26, 27, 28, 29; D. A. 282-349. Px. NN, P. A. 753-55. Px. JJJ-2, P. A. 816-18. H. Ransburg Depo., Px. LLLL, p. 86; P. A. 542-43. Pleva Depo., Px. NNNN, pp. 154-58; P. A. 615-17; D. A. 267-68. E. Ransburg, D. A. 159.

[7] Find. 65; P. A. 1001-02. Dx. 26, D. A. 284-312. Px. JJJ-2, P. A. 816-18. Defendant's Answer to Interrogatory 8 (Exs. D-11, D-30 thereto), D. A. 1-5, 18-23. E. Ransburg, D. A. 156-57. Px. S, P. A. 730. Pxs. Z-1 to -7, inclusive, P. A. 731. Pxs. AA-1 to -3, inclusive. Px. CC-2. Px. LLL-2; P. A. 824. Pleva Depo., Px. NNNN, pp. 186-87; D. A. 268-69. H. Ransburg Depo., Px. LLLL, pp. 83, 86; P. A. 540-41, 542-43. H. Ransburg, D. A. 186; Dx. 27; D. A. 313-14.

[8] In referring (p. 10) to Respondent's 1953 letter to its customers advising of the availability of non-equipment licenses at reduced fees, Petitioner has omitted reference to the trial court's

formed its prospects in writing of the availability of non-equipment licenses, by stating in the initial contact through sales brochures that **when desired**, equipment will be supplied, and before execution of the license, by stating in its transmittal letter that Respondent understands that the prospect prefers the equipment-type agreement to one in which equipment and related services are not to be furnished.[9]

Whenever any prospective licensee has requested or shown interest in non-equipment license terms, Respondent has quoted them. No one has ever requested or been refused a non-equipment license, and Respondent has never required any prospective licensee to take or pay for equipment or services as a condition to obtaining a license under its patents.[10]

The License Received by Respondent's Customers.

Respondent's license agreement forms do not identify the specific patents under which the user is licensed, but grant a right or license to use a particular process to coat certain items in accordance with the specially-designed system shown in the drawing which is made a part of the agreement. The Respondent has never required any prospective licensee, as a condition to receiving a license under

finding that fifty-five of the firms receiving that letter, with knowledge of the available alternative, subsequently executed ninety-seven additional license agreements and in every case chose to have Respondent furnish the equipment and related services. (Find. 67; P. A. 1003. E. Ransburg, D. A. 159-60.)

[9] Find. 65. P. A. 1001-02. H. Ransburg, P. A. 423-24; D. A. 174, 189-90, 190-91. Px. UUUU, p. 15; P. A. 880. Px. VVVV-1, p. 14; D. A. 429. Houlberg Depo., Px. NNNN, pp. 217, 223; D. A. 272-73. Rothe Depo.; Px. NNNN, pp. 255-58; D. A. 274-76. Pxs. BB-1 to -5, inclusive, P. A. 732. Px. III-2. Px. LLL-3; P. A. 825.

[10] Finds. 66, 70; P. A. 1002, 1003-4. H. Ransburg, D. A. 191, 192-93. E. Ransburg, D. A. 159. Entire Record. Px. LLL-1; P. A. 822-24. Pleva Depo., Px. NNNN, p. 158; P. A. 617.

any patent, to take or pay for any license under any patent which did not apply to the system described in the license agreement. No prospective licensee has ever requested a license for coating under specified patents, and Respondent has never refused to grant such a license. No licensee of Respondent has at any time received or paid for a license under any patent which did not apply to the system described in the license agreement.[11]

When prospective licensees have asked Respondent to identify its patents, it has done so (P. A. 178-181). Petitioner's reference (p. 9) to Respondent's agreement with AVCO as an "example" of a studied policy to list inapplicable patents is wholly misleading. The Record shows that this was a **single, isolated instance**; that the listed patents were **inadvertently** recited as applicable; and that this error was promptly corrected when discovered (Px. XXXXX; P. A. 886; D. A. 439-41; Dx. 41; P. A. 965-67).

Patent Rights Acquired by Respondent or Its Predecessor.

(1) Detearing Process.

As a result and in settlement of interference proceedings in the United States Patent Office between a Ransburg application and that of Charles K. Gravley, the Ransburg partnership in 1943 purchased the Gravley application, upon which a patent subsequently issued relating to its "detearing" process (for electrostatically removing "tears" of paint from articles previously coated by dipping). The acquisition of this patent by the partnership and its retention by the Respondent did not damage Petitioner, who has at no time attempted to market electrostatic detearing devices (Find. 73; P. A. 1005-06).

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[11] Find. 71; P. A. 1004. Defendant's Answer to Interrogatory 8 (Exs. D-1 to -38, inclusive), P. A. 114-51; D. A. 1-44, 431-35. H. Ransburg, D. A. 194-95. Entire record.

(2) Compressed-Air Electrostatic Coating Process.

After devoting six years of research and development to their No. 1 Process, the Ransburg partners were advised by counsel to acquire the Pugh patent from Western Electric Company, which was not using the patent in its operations. For the sole purpose of permitting them to proceed with their development and marketing of the No. 1 Process free from danger of possible infringement charges, the partners purchased this patent in 1943, subject to a license reserved to Western Electric and Bell System Companies. The Pugh patent expired on April 26, 1949.[12]

In 1940, when the Ransburg partnership was in the initial stages of marketing its No. 1 Process, it received from Behr-Manning Corporation, a leading manufacturer of sandpaper and abrasives, a written notice stating that some of the latter's patent coverage was directed to the art of "electro-deposition of paint or other liquids" and suggesting a meeting to discuss the matter. Although Behr-Manning's patents pertained in their specific aspects to the manufacture of abrasives and flock-coated articles, the partners were concerned that certain claims of those patents would expose them and their No. 1 Process licensees to infringement charges. For the sole purpose of permitting the partnership to market its No. 1 Process free from the possible risk of such charges, in 1944 the partners entered into an agreement with Behr-Manning whereby Ransburg granted to Behr-Manning an exclusive royalty-free license, with right to sublicense, under Ransburg's listed patents and applications, limited in substance to the manufacture of abrasives, flock-coated, and fiber-

[12] Ind. 72; P. A. 1005. Px. SS, P. A. 762-64. Px. SSSS (letter of April 25, 1941, par. 1, second sentence), D. A. 387-88. H. Ransburg Depo., Px. LLLL, pp. 62-63; D. A. 162-63. Px. T, P. A. 1073-80. Plaintiff's Admission 23 (b), D. A. 55. H. Ransburg D. A. 194-96. E. Ransburg Depo., Px. KKKK, p. 260; D. A. 154.

coated articles; and Behr-Manning granted to the Ransburg partnership a similar license under its listed patents and applications for use in "electrostatic propulsion, dispersion, orientation, deposition," etc., of liquid particles, but not in the manufacture of abrasives, flock-coated, and fiber-coated articles. Neither the patents in suit nor the applications therefor were involved in the agreement.[13]

Prior to the execution of this agreement, Behr-Manning was not engaged in the business of marketing electrostatic spray-painting systems, had done no development work in that field, **and was excluded therefrom by pre-existing Ransburg patents**, and said agreement did not exclude or remove Behr-Manning as an existing or potential competitor of the Ransburg partnership. The agreement did not "divide up the field" between two concerns who were engaged therein or who had a right to market systems therein, as asserted by the Petitioner (p. 7). Rather, the field was divided **by pre-existing patents.** Such patent rights as the Ransburg partnership received under the agreement permitted it to market its **compressed-air** electrostatic spray-coating systems and were not directed to the **airless** electrostatic spray-coating systems of this case.[14]

After the Behr-Manning agreement had been executed and the Ransburg partnership had given assurance to its licensees that it had an exclusive license under the listed Behr-Manning patents, Respondent learned in 1948 that as a matter of fact Behr-Manning did not have the right

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[13] Find. 74; P. A. 1006-07. H. Ransburg, P. A. 437-39, 485-86; D. A. 197-200. Px. PPPP (letter of November 22, 1940); P. A. 862-76a; D. A. 378-85. Px. JJJJ. Dx. 21. Px. UU, P. A. 771-78. H. Ransburg Depo., Px. LLLL, pp. 66-67; D. A. 163-64.

[14] Finds. 74, 75; P. A. 1007-08. H. Ransburg, P. A. 440-41; D. A. 198-99, 206-07. Dx. 16, P. A. 1095-1103. Px. HHHHHH (patent 2,334,648). D. A. 489. Px. T, P. A. 1073-80. Px. UU, P. A. 771-78. Px. JJJJ. Dx. 21.

to grant the partnership a license under the Meston and Wintermute patents, which right was owned by Research Corporation. Thereupon, for the sole purpose of making good its assurance and protecting itself and its licensees against the possible risk of patent infringement charges, Respondent obtained by agreement with Research Corporation an exclusive license under said patents, which was converted to a non-exclusive license in 1954. These patents expired on October 26, 1954, and November 12, 1957, respectively.[15]

At no time has Petitioner attempted to secure from anyone a license under any of the patents assigned or licensed to Respondent or its predecessor pursuant to any of the aforesaid agreements, and Petitioner did not know of the existence of any of said agreements until after the commencement of this action and discovery depositions herein. None of said agreements, or any right acquired by Respondent thereunder, affected Petitioner in any way. Petitioner felt free to market compressed-air electrostatic coating systems at any time, but did not choose to do so until 1958 (Finds. 79, 81; P. A. 1010-11).

(3) Airless Electrostatic Coating Process.

Pursuant to a pre-existing consulting agreement, Respondent in 1952 received an assignment of the Simmons patent, the only patent acquired by Ransburg with relation to the airless No. 2 system from any person other than its own personnel (Find. 77; P. A. 1009). Petitioner has not contended that the acquisition of this patent in any way affected Petitioner or impeded marketing of its SK661 sprayer.

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[15] Find. 76; P. A. 1008-09. H. Ransburg, P. A. 484; D. A. 200-01, 204. Px. UU; P. A. 771-78. Px. BBB. Dx. 21. Px. VV, P. A. 779-90. Plaintiff Admissions 25 (b), 26 (b), 27. D. A. 56-57. Px. QQQQ, D. A. 386.

The License-Back Clause.

So that Respondent and all of its licensees might share in the use of any improvements developed by licensees who had the advantage of the use of the No. 2 Process in its early field experience, the agreement forms employed by Respondent from April, 1951, to January, 1955, included a requirement, in substance, that the licensee grant back to Respondent a royalty-free, assignable, non-exclusive license, with right to sublicense, under any patents, inventions, or improvements acquired by licensee during the term of the agreement and within two years thereafter relating to airless electrostatic coating methods and/or apparatus, such license to be limited to use of the licensed subject matter in coating methods and apparatus. At the time of the trial below some of those agreements were still in effect. Respondent has never acquired any patent or patent right pursuant to said clause.[16]

Industrial Coating Methods and Position of the Parties in the Industry.

Any article which can be coated by an airless electrostatic system can be coated by means of a compressed-air electrostatic system and by non-electrostatic compressed-air guns, operated manually or automatically, the major advantage of the airless electrostatic system over the others being economic. In painting many articles of manufacture, airless electrostatic, compressed-air electrostatic, non-electrostatic air-spray systems, flow-coating, roller coating, or dipping can be and are substituted one for the other and are competitive (Find. 83; P. A. 1011).

Respondent has no monopoly in electrostatic spray-coating systems generally. Electrostatic systems using

[16] Find. 84; P. A. 1011-12. Defendant's Answer to Interrogatory 8, P. A. 46. H. Ransburg Depo., Px. LLLL, p. 37, P. A. 530. Defendant's Answer to Interrogatory 8 (Exs. D-23 to -31, inclusive), P. A. 114-144; D. A. 18-23. E. Ransburg Depo., Px. KKKK, pp. 332-34; P. A. 534-35.

compressed-air guns have been marketed since 1950 or 1951 by at least five competing firms. Petitioner, one of the two largest merchandisers of manual and automatic compressed-air painting equipment and accessories in the United States, has felt free to enter the compressed-air electrostatic field at any time, and did so in 1958 (Finds. 12, 81; P. A. 979-80, 1010-11).

Respondent dominates the marketing only of **airless** electrostatic spray-coating systems, which is by virtue of the temporary monopoly of its patents which were held valid below.[17]

Petitioner's efforts to enter this field consisted of (1) an unsuccessful attempt to sell its SK661 emitter and related equipment to Ford Motor Co., on condition that Ford indemnify Petitioner against liability to Respondent for infringing its Starkey-Ransburg process patent; and (2) an attempt by correspondence to obtain from Respondent, upon terms preferred by Petitioner, a license under that patent to make and sell equipment for use in the patented process. When this license was declined, Petitioner filed the complaint below seeking a judgment declaring the patent invalid, although it had been expressly advised by Respondent that licenses were available to Petitioner's customers to paint with Respondent's method (Finds. 17, 18; P. A. 981-83).

Approximately 0.6% of the total cost of all paint, varnish, and lacquer used industrially in the United States in 1957 was used by Respondent's No. 1 Process licensees, and approximately 1% of said total was used by its No. 2 Process licensees (Find. 83; P. A. 1011).

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[17] Finds. 5, 82; P. A. 976-5, 1011. Counterclaim (pars. 2, 4), P. A. 1, 3. Answer to Counterclaim (pars. 2, 33), P. A. 5, 16. Cross-Counterclaim (pars. 7, 8), P. A. 32. Answer to Cross-Counterclaim (pars. 7, 8), P. A. 42. Dxs. 3, 4; P. A. 1021-35. Roche Depo., Px. LLLL., pp. 292-94; D. A. 245-46. Hedger Depo., Px. LLLL., pp. 1043-44; D. A. 258-59. Entire record.

ARGUMENT.

The Petition Ignores Controlling Findings of Fact.

The Record of this case does not present any question upon which the decision of the Court of Appeals is in conflict with any decision of any other Court of Appeals or of this Court, or otherwise merits consideration by writ of certiorari (Rule 19). Petitioner simply is dissatisfied with the facts as found against it below, and is asking this Court to overthrow these findings and to redetermine the facts, rather than to consider any decision of an issue of law.

Petitioner's request is that this Court depart from its rule that it will set aside findings of fact only "if clearly erroneous,"

> Rule 52 (a), **Federal Rules of Civil Procedure**;
> **United States v. U. S. Gypsum Co.**, 333 U. S. 364, 92 L. Ed. 746, 765-6, 68 S. Ct. 525 (1948);
> **United States v. Yellow Cab Co. et al.**, 338 U. S. 338, 339-41, 94 L. Ed. 150, 152-3, 70 S. Ct. 177 (1949);

and will not undertake to review findings of fact which have been concurred in by the Court of Appeals "in the absence of a very obvious and exceptional showing of error."

> **Graver Tank & Mfg. Co. v. Linde Air Products Co.**, 336 U. S. 271, 274-5, 93 L. Ed. 672, 676-7, 69 S. Ct. 535.

Respondent's "Dominance" Is Limited to Validly Patented Airless Systems.

All of Petitioner's "questions for review" and argument are based upon the assertion that Respondent has a "dominant position in the industry" and a "dominance of the market" (pp. 13, 17), and has been "monopolizing the market" (pp. 26, 35). This ignores and obscures the pertinent

evidence in the Record as to the limited nature of the "domination" Respondent enjoys.

The Record is clear that Respondent does not "dominate" the industrial painting industry, or even the field of electrostatic spray-coating. At least five firms have marketed compressed-air electrostatic systems in competition with Respondent's No. 1 system since 1950 or 1951, and Petitioner felt free to enter this field at any time, and did so in 1958 (Find. 81; P. A. 1010-11).

The only segment of the industry dominated in any sense by Respondent is the manufacture and use of its inventions in the limited field of **airless** electrostatic spray-coating. Such "dominance" as it does enjoy is due to its patents upon systems which are the fruit of its own research and development. This is simply the incentive "monopoly" for a limited period which is created by the patent laws in the public interest and is not condemned by the anti-trust laws.

United States v. Line Material Co., 333 U. S. 287, 308-10, 92 L. Ed. 701, 718-9, 68 S. Ct. 550 (1948);

United States v. E. I. du Pont de Nemours & Co. (D. C. Del., 1953), 118 F. Supp. 41, 214 (affirmed 351 U. S. 377, 100 L. Ed. 1264, 76 S. Ct. 994);

Cole v. Hughes Tool Company (C. A. 10, 1954), 215 F. (2d) 924, 936;

United States v. L. D. Caulk Company (D. C. Del., 1954), 126 F. Supp. 693, 705.

The courts below have adjudicated that Respondent's patents upon which this dominance is based are valid, and that the only device which Petitioner has ever attempted to market in the airless field infringes them (281 F. [2d] 252, 258), by reason of which Petitioner has at no time had any right to market its device. The Petition asks no review of the decision upon patent validity and this decision is now final and is the law of the case.

QUESTION 1.

Respondent has at no time forced or required any prospective licensee to obtain from Respondent, or to pay for, equipment, services, or replacement parts as a condition to the granting of a license. The decision of the Court of Appeals of the Ninth Circuit in Stearns v. Tinker & Rasor, 252 F. (2d) 589 (1957), is not applicable upon these facts and is not in conflict with the decision below.

Petitioner's entire argument under its Question 1 (pp. 11-25), is based upon the false assumption that Respondent has forced or required prospective licensees to obtain from it, or pay for, equipment, services or replacement parts as a condition of obtaining a license under Respondent's patents. This is not and never has been a fact; there is no evidence in the Record to support such a contention or assumption; and the evidence shows that just the opposite has always been true. It has always been a policy of Respondent and its predecessor that a non-equipment license is available to anyone who desires it, and no one has ever been refused such a license. (Finds. 65, 66, 70; P. A. 1001-02, 1003-04.) Respondent's licensees have always preferred to have it supply the equipment and the related services in order to have a working system which will perform as demonstrated by Respondent and behind which Respondent will stand. (Finds. 64, 67; P. A. 1000-01, 1002-03.)

Petitioner erroneously contends (p. 11) that combining a patent license with an equipment lease is "*per se* a violation of the anti-trust laws." This Court has recognized that there is nothing unlawful *per se* in combining a patent license and a lease:

United States v. United Shoe Machinery Co., 274 U. S. 32, 66, 62 L. Ed. 968, 989, 38 S. Ct. 473 (1917);

Hartford-Empire Co. v. United States, 323 U. S. 386, 89 L. Ed. 322, 65 S. Ct. 373 (1944).

To the same effect is

Cole v. Hughes Tool Co. (C. A. 10, 1954), 215 F. (2d) 924, 936.

Petitioner is in error also in arguing (pp. 14-15) that when a licensor has a dominant position in the market by virtue of patents any agreements combining patent licenses and equipment leases are *per se* a violation of the Clayton and Sherman Acts, citing **International Salt Co. v. United States**, 332 U. S. 392, 92 L. Ed. 20, 68 S. Ct. 12 (1947) and **Northern Pacific Rwy. Co. v. United States**, 356 U. S. 1, 2 L. Ed. (2d) 548; 78 S. Ct. 514 (1958). In each of those cases the arrangement was condemned because the licensee or lessee was denied any choice except to agree to the tied combination, unlike the instant case.

As this Court has recognized, the vice in a so-called tie-in contract lies not in offering and consummating it, but in **insisting upon it** and being unwilling to grant an alternative. In the very case cited by Petitioner, **Northern Pacific Rwy. Co. v. United States**, the Court defined an unlawful tyin arrangement as an agreement by a party to sell one product "but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." In a footnote to that statement, the Court stated (p. 6, Footnote 4):

> "Of course where the buyer is free to take either product by itself there is no tying problem **even though the seller may also offer the two items as a unit at a single price**" (Emphasis supplied).

Applying this principle, in **Linde Air Products Co. v. Graver Tank & Mfg. Co.**, 167 F. (2d) 531, 539 (C. A. 7, 1948), it was stated that an illegal tie-in of equipment under the Clayton Act exists only when a party imposes "as a condition of the license" the requirement, condition,

agreement, or understanding that the other goods be taken. Similarly, in **Technical Tape Corp. v. Minnesota Mining & Mfg. Co.** (D. C., S. D., N. Y., 1956), 143 F. Supp. 429, 439; **aff'd** (C. A. 2, 1957), 247 F. (2d) 343; **cert. den.** 355 U. S. 952, 2 L. Ed. (2d) 529 (1958), and in **United States v. Kohler Company** (E. D., Pa., 1953), 1953-4 CCH Trade Cases, Par. 67,553, it is clearly stated that **"refusal to sell"** the tied product separate from the tying product **is the "first essential"** of a tie-in sale prohibited by the anti-trust laws.

Carbice Corp. of America v. American Patents Development Corp. et al., 283 U. S. 27, 75 L. Ed. 819, 51 S. Ct. 334 (1930); **Leitch Mfg. Co. v. Barber Co., Inc.**, 302 U. S. 458, 82 L. Ed. 371, 58 S. Ct. 288 (1937); and **Oxford Varnish Corp. et al. v. Ault & Wiborg Corp.** (C. A. 6, 1936), 83 F. (2d) 764 (cited by Petitioner at pp. 12, 19-20), are not in point because, in contrast to the instant case, in each of them the patent owner followed a studied policy of forcing licensees to buy unpatented materials from him in order to obtain the license.

Without foundation in the Record, Petitioner contends (p. 13) that Respondent's "dominance of the market" was aided by the 1944 agreement with Behr-Manning Corporation. Not only was this agreement entered into by Respondent for the perfectly lawful purpose of permitting it to proceed with the development and marketing of its compressed-air No. 1 Process, after Behr-Manning had called its attention in writing to certain Behr-Manning patents (Finds. 74, 75; P. A. 1006-08), but such patent rights as Respondent acquired under this agreement permitted Respondent to market its **compressed-air** electrostatic coating systems, and its patents in the **airless** field were **not involved** (Find. 74; P. A. 1006). This agreement did not "divide the field of electrostatic spraying" between the parties as claimed by Petitioner (p. 13), because

Behr-Manning was not engaged in the marketing of electrostatic spray-painting systems, had done no development work in that field, and was excluded therefrom **prior to the agreement** by pre-existing Ransburg patents (Find. 75; P. A. 1007-08).

The Behr-Manning agreement had no effect whatever upon Petitioner, for it at no time sought a license from Respondent under any of the patents involved in that agreement; had no knowledge of the existence of the agreement until after this action was filed and discovery depositions were taken; felt free to enter the compressed-air electrostatic spray-coating field at any time; and did so in 1958 (Finds. 79, 81; P. A. 1010-11).

Of no significance is Petitioner's argument (pp. 15-17) that Respondent's license agreements are not by their terms confined to the life of particular patents and "go on indefinitely." These agreements can be terminated by the licensee at any time upon thirty days' notice (Find. 62; P. A. 999). Thus, whenever the applicable patents expire, or the licensee for any reason desires to discontinue the use of the system and the payment of fees, he may terminate the agreement and be under no further obligation to pay fees.

Likewise without merit is Petitioner's contention (p. 15) that because some of Respondent's license agreements were executed prior to the issuance of its Starkey-Ransburg method patent, the Court of Appeals was wrong in concluding that Petitioner had failed to establish that Respondent had engaged in any activity beyond the license of rights incident to its patent monopoly. Respondent had applied for this patent on September 29, 1944 (P. A. 1025), long before it entered into any of the No. 2 system license agreements (Find. 11; P. A. 978-9). Years ago this Court recognized that an inventor has an "inchoate

right" to a patent which can be the subject of a valid assignment before issuance of the patent.

Charles J. Gayler v. Benjamin G. Wilder, 10 Howard 477, 493, 13 L. Ed. 504 (1850);

Andrew H. Hammond v. Mason & Hamlin Organ Co., 92 U. S. 724, 728, 23 L. Ed. 767 (1875);

Cammeyer v. Newton, 94 U. S. 225, 226, 24 L. Ed. 70 (1876).

The owner of a patent application may grant a valid license before the patent issues,

St. Louis Street Flushing Machine Co. v. Sanitary Street Flushing Machine Co. (C. C. A. 8, 1910), 178 F. 923, 926 (cert. den.), 219 U. S. 588, 55 L. Ed. 348, 31 S. Ct. 471,

and an agreement to pay royalties for the right to use an invention is valid, regardless of whether the invention is patentable or unpatentable or whether a patent application has been filed.

Keystone Type Foundry Co. v. Fastpress Co., 272 F. 242, 245 (C. A. 2, 1921);

Sunday v. Novi Equipment Co., 290 Mich. 539, 287 N. W. 909, 913 (1939).

Proceeding from the false assumption that Respondent forced prospective licensees to take unwanted equipment or services, Petitioner argues (pp. 21-25) that Respondent undertook in 1953 an ineffective "purge" of its alleged misconduct. Inasmuch as the availability of non-equipment licenses has always been Respondent's policy, there was nothing to "purge" in 1953. The letters to Respondent's customers and the preparation of standard non-equipment agreement forms in that year simply constituted an effort on the part of Respondent to be sure that all of its customers and prospective licensees knew and understood that they had this freedom of choice (H. Ransburg, P. A. 542-3).

Petitioner asserts (p. 23) that Respondent did not call as witnesses at the trial any of its licensees. Inasmuch as no evidence of forcing equipment or services was adduced, there was no occasion for Respondent to call customer witnesses on this issue. Petitioner had the burden of proving patent misuse or anti-trust violation and had access to all of Respondent's hundreds of customer files in the course of discovery. Petitioner offered deposition testimony of representatives of only three licensees, which at most tended to prove that two of them were not aware of the availability of non-equipment licenses at the time they entered into agreements with Respondent. However, these two deponents, Houlberg (P. A. 633) and Rothe (P. A. 636), expressly testified that they **did not at any time request a license** under Respondent's patents, and that **they were interested in investigating and obtaining proposals upon Respondent's equipment** (D. A. 270, 636). The other, deponent Wallin, testified that **his company was advised by letter of the availability and terms of the non-equipment license** but **elected** to have Respondent furnish the equipment and related services (P. A. 641, 643-4).

It is significant that, after Respondent furnished to Petitioner in discovery proceedings the names of all its licensees and opened its customer files to Petitioner's inspection, **Petitioner did not produce by deposition or at the trial a single customer who claimed to have been forced to take** equipment, services, or parts in order to obtain licenses to use Respondent's processes, and that the only licensee representatives whose testimony was introduced testified that they were interested in and wanted Respondent's equipment.

No Conflict With Ninth Circuit.

Upon this record of freedom of choice between equipment and non-equipment licenses the decision of the Court

of Appeals of the Ninth Circuit in **Stearns v. Tinker & Rasor**, 252 F. (2d) 589 (1957) is not applicable and is not in conflict with the decision below. There the patentee marketed a detection system consisting of a patented combination plus unpatented electrical apparatus, and the District Court found as a fact that it **would not** make the patented apparatus available except in combination with and tied to the electrical apparatus (p. 602). The Court of Appeals affirmed this finding, observing that the patentee had not been asked directly whether he refused to sell or to operate on any other basis, and that had he been asked that question there would have been no problem. The Court stated further (p. 604):

> "The mere fact that an owner of a patented article combines the article with an unpatented article and sells or leases the unit as a whole does not *per se* prove misuse. The holder of a patent can exploit his legally protected monopoly in the patent as best he sees fit, so long as in doing so he does not restrain competition in the unpatented article. Probably the best way for an owner of such a patent to protect himself from a charge of misuse would be to offer or **stand ready to offer the patented item alone**" (Emphasis supplied).

Unlike the **Stearns** case, here Respondent's officers testified specifically that it had always been Respondent's policy to make patent licenses available without equipment or related services, and that no one had ever been refused such a license, and the courts below concurred in specific findings to this effect. (Finds. 65, 66, P. A. 1001-02). Respondent has always "stood ready to offer the patented item alone."

QUESTION 2.

Respondent has not required any prospective licensee to take or to pay for any inapplicable or unwanted patent. Upon the facts of this Record the decision of the Court of Appeals for the Third Circuit in American Securit Co. v. Shatterproof Glass Corp., 268 F. (2d) 769 (1959), is inapplicable and is not in conflict with the decision below.

Respondent's standard customer agreement permits the use of a particular system designed for the individual customer's production needs and described in a drawing which is a part of the agreement, and does not list the patents which are applicable to that particular system. This is the simplest way of assuring each customer of a license under such, and only such, patents as are actually applicable to that system. No license under any inapplicable patent is granted expressly or by implication (Exs. D-29 and D-32; P. A. 137-45). If, in connection with a contemplated agreement, the prospective customer wishes to know what patents are owned by Respondent, he is furnished a list of the patent numbers (Ex. F; P. A. 174-81). Under this practice no licensee receives or pays for any license which is not applicable to his system and required for its lawful use.

Furthermore, there is absolutely no evidence in the Record that any prospective customer has at any time requested from Respondent a license under specific patents for the use[18] of any patented system, or that Respondent has refused any such request. Respondent's Vice President testified at the trial that no one had ever made any such request (H. Ransburg, D. A. 194-95).

Contrary to the statement on page 5 of the Petition, that Petitioner was "foreclosed from entering" the air-

[18] Petitioner inquired about a license to *make and sell equipment* for the process, which was refused on grounds unrelated to licenses under other patents (Find. 18; P. A. 982-83).

less electrostatic equipment market because Respondent would not permit Petitioner to sell its sprayer to anyone who did not already have Respondent's leased equipment, Respondent's letter to Petitioner of September 21, 1956 (Px. ZZZZ-13, P. A. 911-12) plainly stated:

> "... **We want you to know that licenses are available to your customers for painting with our method** ..." (Emphasis supplied.)

There never having been any requirement or compulsion by Respondent that any customer take any license that he does not need or want, there is no conflict (as claimed at page 29 of the Petition) between the decision below and that of the Third Circuit in **American Securit Co. v. Shatterproof Glass Corp.**, 268 F. (2d) 769, in which the Court held to be a misuse of patents a "stated policy" of the patentee whereby it was "**mandatory**" that a licensee take and pay for a license under patents which were **not applicable** to the licensee's intended operation, in order to obtain a license under the patents which were applicable and under which the licensee did desire a license. The Court said (p. 775) "The substantial issue presented by the appeals at bar is whether package licensing, **cumpulsory, as distinguished from voluntary**, insofar as the applicant for a license is concerned, ... constituted a misuse of patents ..." (emphasis supplied). Petitioner's argument that this case is similar to the cited case because the "agreements went on indefinitely" (p. 30) is erroneous, because all of them are terminable by the customer at any time on 30 days' notice (Find. 62; P. A. 999).

In an effort to overcome the well-supported findings in which the courts below concurred on this issue (Find. 71; P. A. 1004), Petitioner refers to Respondent's agreement with AVCO Manufacturing Company and asserts that the listing of inapplicaple patents in the agreement was "done deliberately." If Respondent had in fact had a policy of

compulsory package licensing. Petitioner, with access to all of respondent's customer files, would have been able to establish such policy by proof of more than one instance. The Record shows clearly that the recital in the AVCO agreement that the listed patents applied to the licensed system was entirely inadvertent and that this error was promptly corrected when discovered in the course of these proceedings (Px. XXXXX; P. A. 886; D. A. 439-41; Dx. 41; P. A. 965-67). The courts below properly regarded the AVCO transaction as an isolated instance of inadvertent error, rather than evidence of a practice of forcing inapplicable licenses.

QUESTION 3.

The license-back provisions in Respondent's early No. 2 system agreements were lawful and have not damaged Petitioner. Upon this Record there is no conflict between the decision below and Hartford-Empire Co. v. United States, 323 U. S. 386; 324 U. S. 570.

Commencing in 1951, during the early field experience of the No. 2 Process, Respondent's customer agreements contained a license-back clause which was eliminated from its standard license forms in January, 1955, and was not used thereafter. In substance this clause provided that Respondent would have a royalty-free, non-exclusive, assignable license, with right to sublicense, with respect to improvements or inventions made or acquired by the licensee during the term of the agreement and two years thereafter, pertaining to methods and apparatus relating to the licensed process, such license to be limited to use of the improvements and inventions in coating methods and apparatus. Respondent has never acquired any patent or patent right pursuant to the clause (E. Ransburg Depo., Px. KKKK, pp. 32-4; P. A. 534-5).

The license-back clause had absolutely no effect upon Petitioner and could not have damaged it in any way,

inasmuch as Petitioner never sought or entered into a license to use Respondent's airless system for the coating of any product[19] and never entered into any agreement containing this clause. Inasmuch as Petitioner's "cross-counterclaim" below is a private action for damages and relief under the anti-trust laws, an essential element of the action is injury or damage to the business or property of Petitioner. There having been no damage to Petitioner in its business or property as a result of the former use of this clause by Respondent, the clause in no event could constitute the basis of an action by Petitioner under the anti-trust laws.

Blaski v. Inland Steel Co. (C. A. 7, 1959), 271 F. (2d) 853, 854-5;

Peller v. International Boxing Club (C. A. 7, 1955), 227 F. (2d) 593;

Sperry Products, Inc. v. Aluminum Company of America (D. C., N. D., Ohio, 1959), 171 F. Supp. 901, 938.

Furthermore, the license-back clause was employed for a legitimate purpose, was of appropriate scope, and was lawful. This Court has held that even a clause requiring the licensee to **assign or grant back** improvement patents to the licensor is not *per se* illegal.

Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U. S. 637; 91 L. Ed. 563; 67 S. Ct. 610 (1947).

Respondent's clause did not require licensees to assign or turn over to Respondent their improvement inventions, but only required that Respondent and its other licensees be permitted to share in the use of such improvements through a non-exclusive license, thereby leaving the in-

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[19] The only license ever sought by Petitioner was to make and sell equipment for use in the patented process. The license was declined on grounds unrelated to the license-back clause, which was no longer in use (Finds. 18, 84; P. A. 892-93, 1011-12; Px. ZZZZ-2 to 10, -13, P. A. 895-908, 911-12).

ventor the exclusive right to his invention in all fields except that of coating, and within the coating field the right to use his invention and to license others to use it.

Petitioner did not present at the trial the testimony of any licensee in support of its contention (p. 33) that research or development "had been stifled" by this provision. Its reference to the 1953 letter of one of Respondent's licensees to Harold Ransburg does not support this inference. From the context of the letter it is clear that when the General Electric representative who was quoted therein referred to "getting any further work done on the equipment", he was referring to research and development work by **Respondent**, not General Electric (P. A. 743-4). The testimony of Harold Ransburg referred to on page 33 of the Petition, shows affirmatively that the licensees **did** have an incentive to make improvements on the No. 2 system for the purpose of improving their own operation (P. A. 487).

On this Record, the trial court's finding (Find. 84; P. A. 1011-12) that the clause did not stifle or discourage research or invention was proper. The Court of Appeals correctly concurred, observing that the asserted effect of the clause "is purely conjectural" (Pet. App. 7), the same conclusion reached by this Court in **Transparent-Wrap** (p. 646).

Petitioner is in error in stating (p. 32) that "the Courts below erroneously and contrary to the admitted facts assumed Defendant had discontinued all its license back provisions in its outstanding agreements." The District Court specifically found that some of the license agreements containing this clause were still in effect (Find. 84; P. A. 1012). There is no indication that the Court of Appeals assumed otherwise, its opinion stating only that this provision was eliminated from Respondent's license "**forms**" in 1955 (Pet. App. 7).

Because of the legitimate purpose and limited nature of the license-back clause formerly used by Respondent and the other relevant facts in this Record, the decision below is in no respect in conflict with **Hartford-Empire Co. v. United States**, 323 U. S. 386; 324 U. S. 570, or any other decision of this Court. In **Hartford-Empire** several owners of controlling patents in the glass making industry pooled their patents and cross-licensed them as part of a proved conspiracy to control the industry, and used their patent position to allocate fields of manufacture, to limit production of glassware by a quota system, to maintain prices of unpatented glassware, and thereby to exclude everyone from the industry who did not deal with the conspirators (pp. 354-58). It was as an integral part of this conspiracy between competing patent owners and manufacturers that the grant-back provisions in the cross-licenses came under criticism. There is no evidence in the present Record, of course, which even approaches the facts upon which the **Hartford-Empire** decision was based, or upon which an anti-trust law violation might be made out within the meaning of the principles stated in **Transparent-Wrap Machine Corp. v. Stoke & Smith Co.** 329 U. S. 637 at 647-8.

Inapplicable for the same reason are Petitioner's citations (p. 35) to **United States v. General Electric Co.**, 80 F. Supp. 989, where clauses requiring **assignment** of improvement inventions to the licensor were condemned because they were an integral part of a wide-spread network of agreements **between competing companies to control the market** in certain products, the "**primary purpose**" of which "was a system of **price control** that ranged over the entire cemented carbide industry" (p. 1016); and to **United States v. General Electric Co.**, 82 F. Supp. 753, where license-back provisions were held bad because part of agreements between competitors in the manufacture of lamps which effectively controlled domestic manufacture and sale and imports of certain types of lamps.

Respondent's license-back provisions, eliminated from its standard forms in January, 1955, were of lawful purpose and scope, and in any event did not damage the business or property of Petitioner.

QUESTION 4.

The Court of Appeals properly decided that Respondent had not procured its patents fraudulently. On this Record, there is no conflict between its decision and those in Precision Instrument Mfg. Co. v. Automatic Maintenance Machinery Co., 324 U. S. 806; Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238; or Keystone Driller Co. v. General Excavator Co., 290 U. S. 240.

Without any justification whatever in the Record Petitioner argues that Respondent "fraudulently evolved a scheme to continue its monopolization" of a field which it dominated "by a succession of wrongfully procured invalid letters patent," which was carried out by "making false representations by affidavits to the Patent Office" (p. 37, et seq.).

The affidavits to which Petitioner refers in making this scandalous accusation (Pet. App. 76-81) were executed and submitted to the Patent Office in March, 1953, in support of the claims then pending in the application which resulted in the two patents in suit. Petitioner's alleged "succession" of wrongfully procured patents involves no others. These patents are **not** invalid, as stated by Petitioner, but have been expressly adjudicated as valid by the courts below.

There is no misrepresentation of any fact in either of the affidavits to which the Petition refers, and there is no evidence in the Record that the Patent Office was misled by anything therein. The nature of Respondent's commercial No. 2 systems, with their rotating atomizing heads (D. A. 458), was well-known at the time (Pet. App. 80-1).

Petitioner's argument that fraud was perpetrated on the Patent Office is based on the fallacious premise that the inventions claimed in the patents in suit are absent from Respondent's commercial systems. This fallacy is exposed upon correction of the misstatements in the Petition as to both the nature of those inventions and the nature of the atomizing devices in the commercial systems. The nature of the inventions is misstated when they are defined by reference to a file-wrapper statement made with respect to earlier claims which differed materially from the claims ultimately granted, which latter claims were the ones in issue when the affidavits were submitted. The nature of the commercial atomizing devices is incorrectly stated when they are described as "centrifugal atomizing" heads (p. 39), as has been pointed out above in the "Statement of the Case," footnote 5.

Both courts below gave full consideration to the circumstances upon which Petitioner's unwarranted charge of fraud is based and rejected that charge, as is evident from Findings 11, 42, 54, and 91 (P. A. 978-79, 990-91, 997, 1013) and the following portion of the opinion of the Court of Appeals which was not reproduced by Petitioner in its Appendix (Pet. App. 2-8) (281 F. [2d] 252, at 256):

> "The specific atomizing heads shown in the specifications of defendant's method and apparatus patents utilize spaced needles, spaced orifices, or spaced wire wrappings. The liquid emerging from the interior of the head is thus mechanically divided into droplets from which the atomization takes place. The defendant's commercial atomizing device utilized a rotating bell or rotating disk through which the liquid coating is fed and at the edge of which atomization takes place at a plurality of closely spaced points. However, neither the claims of the method patent nor of the apparatus patent are limited to feeding the liquid through a plurality of orifices or points of separa-

tion obtained mechanically or structurally. And the claims not the drawings define the invention. American Anode, Inc. v. Lee-Tex Rubber Products Corp., 7 Cir., 136 F. 2d 581. The variance in structure employed in the commercial atomizing head is not indicative that the commercial success enjoyed is not attributable to the method and apparatus patent. The revolving bell or rotating disk feeding the paint to the atomizing zone by centrifugal force is fully embraced within the general concepts of the invention and constitutes a mere improvement in the mechanics of presenting the liquid to the zone of atomization.

"And what has been said in this connection on the subject of commercial success also disposes of plaintiff's contentions that because of the difference between the atomization heads shown in the drawings and those utilized in defendant's commercial system a fraud was practiced on the Patent Office in the representations made with respect to commercial success and that the alleged fraud is indicative of defendant's purpose 'to monopolize wrongfully the entire field of electrostatic coating on false affidavits.'"

Since the courts below have so clearly recognized the commercial systems as embodying the inventions of the patents in suit, there was no fraud in citing the commercial systems to the Patent Office as evidence of commercial success of these inventions.

There having been no fraud or misrepresentation in the obtaining of these patents, or "assertion of invalid patent claims" by Respondent in its marketing of its system, none of the decisions cited by Petitioner at page 40 has any application to the Record in this cause.

CONCLUSION.

It is submitted that when the relevant and controlling facts established by the Record, found by the District Court, and concurred in by the Court of Appeals, are taken into account, none of the questions stated in the Petition is presented for consideration or decision by the Record in this cause. The decision of the Court of Appeals is not in conflict with any decision in any other circuit or with any decision of this Court, and does not otherwise call for review upon certiorari. The Petition for a Writ of Certiorari should therefore be denied.

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